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In The

Supreme Court of the United States

October Term, 1992

DANNY FISHER,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED

I.

WHETHER THE STANDARD OF CONDUCT IMPOSED UPON THE GOVERNMENT IN THE PROSECUTION OF CRIMINAL TRIALS HAS TO BE MORE CLEARLY DEFINED AND WHETHER THE GOVERNMENT IN THIS CASE VIOLATED THAT STANDARD.

II.

WHETHER THE COURT OF APPEALS PROPERLY DENIED PETITIONER THE RIGHT TO HAVE THE RECORD CLARIFIED WHEN THE COURT OF APPEALS' DECISION RESTED ON AN INACCURATE UNDERSTANDING OF THE RECORD WHEN IT APPLIED THE PLAIN ERROR STANDARD OF REVIEW WHEN IN FACT A CONTEMPORANEOUS OBJECTION HAD BEEN MADE BY TRIAL COUNSEL.

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No. _____

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-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, DANNY FISHER, by his attorney, Edward Wishnow, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

REPORTS OF OPINION DELIVERED BELOW

The United States Court of Appeals for the Sixth Circuit in its opinion dated July 21, 1992, affirmed the judgment of conviction of Petitioner in the United States District Court for the Eastern District of Michigan. This opinion of the Court of Appeals is a non-published opinion.

Following the Court of Appeals opinion, Petitioner filed in the Court of Appeals a motion for remand and a motion to hold re-hearing schedule in abeyance and for an order to stay the mandate. The Court of Appeals by its order of September 15, 1992, denied Petitioner's motions.

JURISDICTIONAL GROUNDS

The order sought to be reviewed is an opinion of the United States Court of Appeals for the Sixth Circuit dated July 21, 1992, which affirmed a judgment of conviction of Petitioner in the United States District Court for the Eastern District Of Michigan[1]

Following the Court of Appeals opinion, Petitioner filed in the Court of Appeals a motion for remand and a motion to hold re-hearing schedule in abeyance and for an order to stay the mandate. The Court of Appeals by its order of September 15, 1992, denied Petitioner's motions.

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

COURT RULES INVOLVED

Rule 52 of the Federal Rules of Criminal Procedure provides as follows:

> "Rule 52.
> Harmless Error and Plain Error
>
> (a) Harmless Error.
> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error.
> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

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[1] **Thomas Silvestri was a co-defendant with Petitioner at trial and on appeal, but is not a party to this Petition.**

STATEMENT OF THE CASE

Petitioner, DANNY FISHER, was indicted with Thomas Silvestri in a twelve-count superseding indictment charging various offenses having to do with the manufacture and distribution of amphetamine. FISHER was charged in Count One with conspiracy to manufacture, possess with intent to distribute and to distribute amphetamine; in Count Two with the unlawful establishment of manufacturing operations; and in Counts Five, Six and Seven with the unlawful distribution of amphetamine all in violation of 21 USC 841(a)(1). FISHER went to trial in the Eastern District of Michigan, Southern Division, before a jury, the Honorable George E. Woods presiding, on April 9, 1991. On April 12, 1991, the jury returned a verdict of guilty on all counts. On July 22, 1991, Petitioner was sentenced to a term of 151 months imprisonment for each count, the terms to run concurrent with each other; and upon release, Petitioner was placed on a three year term of supervised release.

On direct appeal to the United States Court of Appeals for the Sixth Circuit, Petitioner's judgment of conviction was affirmed by the Court's opinion dated July 21, 1992. Petitioner then filed a motion for remand and motion to hold re-hearing schedule in abeyance and for an order to stay the mandate based on a need to clarify the record as to whether or not Petitioner's counsel at trial had made a proper objection to testimony that was complained of on appeal. The Court of Appeals by its order dated September 15, 1992, denied Petitioner's motions.

The trial court, the Eastern District of Michigan, Southern Division, had jurisdiction over this case pursuant to 18 USC 3231. The Court of Appeals had jurisdiction pursuant to 28 USC 1291, which provides for

appeals from all final judgments of United States District Courts.

On March 20, 1990, Steven Thomson was arrested at a trucking depot located at 3120 West Jefferson Avenue in Detroit, Michigan. Thomson was arrested shortly after selling two ounces of amphetamine to Mary Sandy, a Drug Enforcement Administration (hereinafter DEA) undercover agent. Thomas Silvestri, who was present at the trucking depot was also arrested. Silvestri had on his person pre-recorded government funds which had been used in three prior purchases of amphetamines.

That same day, a search was conducted of the trucking depot area and papers were found that connected Danny FISHER to a residence located at 8860 Falcon Street in Detroit, Michigan. A search warrant was executed at the Falcon Street address on that date, and a fairly sophisticated clandestine amphetamine laboratory was located on the second floor.

Although the laboratory was not operating when the search warrant was executed, the DEA chemist indicated that 11-20 pounds of amphetamine could be produced from the chemicals that were seized there. Among the chemicals seized were highly flammable and poisonous materials.

Sometime after Thomson and Silvestri were indicted, Thomson cooperated with the government and supplied information leading to the arrest and indictment of Danny FISHER. By cooperating with the government, Thomson reduced his potential exposure under a Rule 11 Plea Agreement from 97 months to 60 months.

FISHER, Silvestri and Thomson knew each other from childhood and their school days. FISHER had a trucking company, Delta Leasing, which was having financial difficulties and was in fact going into bankruptcy. A new

company called Thomson Trucking was started but according to Thomson, FISHER was the owner although the assumed named certificate and lease were in the name of Thomson. Sometime in the summer of 1989, Silvestri rented space in the trucking depot. Plumbing and a venting system were placed in this room. FISHER was observed on the roof doing some work. FISHER and Silvestri apparently had a falling out and FISHER told Silvestri that he had to leave the premises.

Elton Mitchell, who worked for the trucking company, helped dismantle and clean out the room. Mitchell was upset with Thomson because Thomson had assaulted him on New Years Day. As a consequence, Mitchell who suspected that there was a laboratory at the trucking depot, went to a police officer that he knew at the Detroit Police Department, who in turn referred Mitchell to the DEA.

Mitchell asked Thomson for some dope. Thomson said he was the source and gave Mitchell a one gram sample which was than given to the DEA.

At the behest of the DEA, Mitchell told Thomson that he had someone who was interested in some amphetamine. On February 12, 1990, Mitchell took agent Sandy to the trucking depot. She did not meet anyone on that day but did obtain one ounce of amphetamine in return for $600.00.

On February 27, Sandy went back to the trucking depot ostensibly to look for Mitchell. FISHER and another individual were present. Sandy asked FISHER if he knew anything about a package to pick up and he said he did not. Later that day Sandy went back to the terminal and met Mitchell. FISHER was in the back room and Mitchell asked him where the package was. FISHER said "it's in the drawer." In the drawer was an envelope

containing one ounce of amphetamine wrapped in yellow paper which had a notation "Elton, leave the money here and lock the lock." Sandy took the one ounce of amphetamine and left $600.00 in the envelope and wrote a note saying "thanks, S.T. Mary.".

On March 6th, Sandy made arrangements to buy two ounces from Thomson for $1,200.00. When she arrived, he was alone and only had one ounce. He left for 20 minutes and came back with the other one. Thomson was surveilled by other agents on that date going to the Falcon Street address.

On March 19, Sandy again met with Thomson and purchased just under two ounces of amphetamine for $1,100.00.

On March 20, Sandy again went to the trucking depot and met Thomson and purchased two ounces of amphetamine for $1,200.00. Shortly thereafter, Thomson and Silvestri were arrested.

Thomson indicated that FISHER originally gave him an envelope with one ounce of amphetamine to sell and gave him five one gram packages of samples. Thomson gave one gram to Mitchell and one to Mike McGladdery who had a business across the street from the trucking company. Thomson said the arrangement was that Silvestri would take half of whatever came in on the sale of amphetamine and that he and FISHER would split the other half. McGladdery, who indicated that he had a good relationship with Thomson, but was distant with FISHER, acknowledged that Thomson gave him some amphetamine. He also indicated that FISHER upon seeing him at the trucking depot on one occasion indicated "Oh, you are here to get some of that shit."

FISHER had originally rented the property on Falcon Street to Thomas Meshinski an employee of FISHER's.

Because Meshinski had difficulty paying rent, FISHER told Meshinski that he wanted to rent the two upper bedrooms to Silvestri who he indicated was making fishing poles. Meshinski indicated that there were foul odors coming from the rented rooms. He further indicated that FISHER helped Silvestri move some stuff in; and after Silvestri moved in FISHER came over only one other time with Thomson.

On re-direct examination of Meshinski, the government asked him if he was afraid of anything or anybody and he indicated that he was afraid of not being able to walk out of here and that he was afraid of Danny FISHER.

Thomson indicated that after he was arrested but before FISHER was arrested, FISHER offered to give him $5,000.00. He further indicated that after FISHER was arrested, FISHER offered to give Thomson $25,000.00 to hire another lawyer and change his testimony; and further offered him $10,000.00 a year for any jail time that Thomson had to serve.

During rebuttal closing argument, the government made reference to the drug problem in the country[2], commented on defense counsel's argument[3], commented on the jury not hearing from the Petitioners[4], and commented on the fears of Meshinski.[5]

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2 **"The drug problem in this country is of a magnitude way too large for the government to waste its time with people that have been sucked into something by two bought witnesses." Government Rebuttal, April 11, p. 190.**

3 **"You are the judges of credibility. What Mr. Garish thinks doesn't matter." Government Rebuttal, April 11, p. 190.**

4 **"Mr. Bufalino says there were tapes, why didn't the government play the tapes."**

* * *

"Yes, there were tapes in this case.

(Footnote 4 concluded on page 8; along with entirety of Footnote 5)

ARGUMENT

Petitioner submits that Certiorari should be granted in this case because the United States Court of Appeals for the Sixth Circuit decided an important question of federal law which has not been, but should be, settled by the Supreme Court. More specifically, the question is to what extent will prosecutorial misconduct in the trial of a federal criminal trial be tolerated by the Appeals Court and the Supreme Court.

It is clear that the trial courts and the government prosecutors must be given some guidance by this Court as to the limits that federal criminal jurisprudence will tolerate as far as prosecutorial misconduct.

Petitioner also submits that the opinion of the Court of Appeals in this case decided a federal question in a way that conflicts with the applicable decisions of this Court on the issue of prosecutorial misconduct.

Petitioner submits that government misconduct existed in the trial to such a degree that the prejudice that resulted can only be cured by a reversal and new trial. In particular, Petitioner suggests that the prosecutor committed improper rebuttal argument in four areas. In addition, one of the four areas was previously improperly utilized by the prosecution in redirect testimony of one of the government's witnesses.

(*continued from page 7*)

I told you that at the beginning, but you had the real witnesses here.

Both defendants have the tapes.

Now, they have no obligation whatsoever to present a defense. None. The burden is entirely on the government.

But, if those tapes said anything different from what you heard from the stand, you would have heard them from the Defendants." Government Rebuttal, April 11, p. 191.

[5] **"What did Mr. Meshinski told you. He was afraid of someone (indicating the defendants)." Government Rebuttal, April 11, p. 198.**

The four areas of government misconduct are (1) the prosecutor argued and inflamed the jury about the drug problem in the country, (2) the prosecutor denigrated the comments of FISHER's attorney, (3) the prosecutor improperly commented on the Petitioner's Fifth Amendment right not to testify or present any evidence, and (4) the prosecutor attempted to suggest and argue about FISHER's bad character by referring to fears a witness had of FISHER.

In cases on direct review, as this case, the standard of conduct imposed upon the government and the prosecution of criminal trials is outlined in *Berger* v. *United States*, 295 US 78, 55 S Ct 629, 79 L Ed 1314 (1935). The *Berger* standards are that

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done, As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger at p. 88.

In *Withers* v. *United States*, 602 F. 2d 124 (6th Cir. 1979), the Court reversed an interstate kidnapping case because of an offending racial argument made by the United States Attorney. In so holding, the Court at p. 127 stated that:

> "This Court believes that it has the duty to require the United States Attorneys in this Circuit to follow the slogan carved in wood at the entrance of the office of the Attorney General of the United States: 'The United States wins its point whenever justice is done its citizens in the courts.' The U.S. Attorney in the courtroom is much more than just another lawyer. He speaks to the jury for the United States of America. His words carry the weight of his office. The United States above all parties should never proffer invidious comparison between races or argument founded on facts outside of the record. Such erroneous argument, because of its source, is much more likely to be accepted by a jury than is similarly objectionable argument by a private practitioner."

"Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger* at p. 88. The Sixth Circuit has strictly protected against this type of misconduct. *United States* v. *Peak*, 498 F 2d 1337 (6th Cir. 1974), *United States* v. *Wiley*, 534 F 2d 659 (6th Cir. 1976), *United States* v. *Leon*, 534 F 2d 667 (6th Cir. 1976). As part of the standard of conduct, the government attorney is neither privileged to "testify in the guise of a closing argument, "nor bring to the jury's attention purported prejudicial facts not in evidence. *Peak*, *supra*; *Leon*, *supra*.

A. The Prosecutor Used Improper And Inflammatory Argument When He Referred To The Drug Problem In The Country.

In rebuttal closing argument, the prosecutor commented on the drug problem in the country and sug-

gested that the government wouldn't waste its resources on a case that didn't have merit.[6]

The Sixth Circuit has on several occasions had to reverse convictions due to improper and prejudicial comments made by the prosecutor in closing argument. In *Leon*, *supra*, the Court found error in the prosecutor characterizing the appellant's gambling activities as part of a nation wide scheme causing hardship to innocent people in the cities.[7] The Court reversed as it was "unable to conclude that the improper attempt of the prosecutor to link these appellants to a nationwide gambling syndicate destructive of cities and of homes could not have effected the jury's interpretation of recorded conversations and its assessment of the credibility of the witnesses." at 683.

More recently, in *United States* v. *Solivan*, 937 F 2d 1146 (6th Cir. 1991), the Court again found reversible error where the prosecutor improperly argued a community problem to the jury. In *Solivan*, like in the instant case, the prosecutor alluded to the drug problem.[8]

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6 **"The drug problem in this country is of a magnitude way too large for the government to waste its time with people that have been sucked into something by two bought witnesses. Government Rebuttal, April 11, p. 190.**

7 **The prosecutor attempted to discuss the legislative history of the gambling laws in his opening argument. The prosecutor stated among other comments that "congress, during those investigations and as a basis for putting this law into effect, found that large scale gambling businesses were a drain on the public and found that they were against the public welfare."**

8 **During closing argument the prosecutor made the following comments: "What you're listening to is a wholesale distributor of narcotics, cocaine discuss her business affairs and complain about her busy schedule, the lack of good product and the trouble she's having getting this stuff up here now. And I'd submit to you, folks, that she's been caught now. And I'm asking you to tell her and all of the other drug dealers like her — (defense counsel's objection and Court's response omitted) — [t]hat we don't want that stuff in Northern Kentucky and that anybody who brings that stuff in Northern Kentucky and . . ."**

The Court found that "the effect of the prosecutor's comments was to suggest to the jury that, because of defendant's participation in the drug trade in Northern Kentucky, the drug problem facing the jurors' community would continue if they did not convict her. It is error for a prosecutor to direct the jurors' desires to end a social problem toward convicting a particular defendant," at 1153. The Court further found that "Defendant's constitutional right to a fair trial was violated because the appeal to the community conscience and the context of the war on drugs prejudicially impacted on her. . . . However, government prosecutors are not at liberty to urge jurors to convict defendants as blows to the drug problems faced by society or specifically within their communities, or to send messages to all drug dealers. Such appeals are extremely prejudicial and harmful to the constitutional right to a fair trial," at 1153.

B. Prosecutor Improperly Denigrated The Efforts And Comments Of Appellant's Counsel.

Immediately after commenting on the drug problem, the prosecutor suggested that Petitioner's counsel's comments didn't matter.[9]

In *Sizemore* v. *Fletcher*, 921 F 2d 667 (6th Cir. 1990), the Court granted a writ of habeas corpus to a petitioner who was appealing a Kentucky murder conviction. Petitioner had argued prosecutorial misconduct on his habeas petition. In *Sizemore*, the prosecutor commented on the arguments of defense counsel.[10]

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[9] **Government in its rebuttal argument following its comments on the drug problem said "You are the judges of credibility. What Mr. Garish thinks doesn't matter." Government Rebuttal, April 11, p. 190.**

[10] **In closing argument the prosecutor stated "It happens in all cases. After I hear the defense attorney, I wonder what trial I have**

(*concluded on page 13*)

In granting the writ, the Court stated that, ". . . when a prosecutor has made repeated and deliberate statements clearly designed to inflame the jury and prejudice the rights of the accused, and the Court has not offered appropriate admonishments to the jury, we cannot allow a conviction so tainted to stand," at 670.

In *Bruno* v. *Rushen*, 721 F 2d 1193 (9th Cir. 1983), petitioner filed a writ of habeas corpus appealing a California murder conviction. He argued that the prosecutor had characterized his counsel's actions as unethical and perhaps illegal without producing any evidence to support these accusations. In granting the writ in *Bruno*, the Court found that the prosecutor's "insidious attacks on Bruno's exercise of his constitutional right to counsel and his attacks on the integrity of defense counsel were error," at 1195.

The prosecutor by suggesting that defense counsel's comments didn't matter impliedly suggested that only what he, the government attorney, said mattered. Further, by this tactic, the prosecutor would suggest to the jury that his personal opinion and comments carries more weight than the defendant's counsel. Clearly, this is not proper. *United States* v. *Bess*, 593 F 2d 749 (6th Cir. 1979).

C. The Prosecutor Improperly Commented On The Petitioner's Failure To Testify And Present Evidence.

Silvestri's counsel in his closing argument questioned why the government did not present in its case tape

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(*continued from page 12*)

been to when they start relaying the evidence to me because I don't half of . . . I never heard half of what they tell the jury and I start thinking, 'where do we get this fairy tale; what fantacy [sic] is this?' Then I thought, 'How appropriate that we are hearing fairy tales from Mr. Burns. . . .'"

recordings of conversations that were recorded by body recorders worn by certain witnesses.[11] The prosecutor in his rebuttal arguments also commented on the tapes.[12] Upon objection by counsel, the Court conducted a side bar conference and decided to deny the Petitioners' Motion for Mistrial and instead gave the jury a cautionary instruction.[13]

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11 (Argument of counsel for Silvestri) "If they really wanted to let you know what was going on, Mitchell and special agent Sandy were both monitored at all times.

Why didn't they bring these wires in here?

They had a recording of what was going on.

If they really wanted to tell you what was going on, why didn't they bring it here?"

12 (Rebuttal closing of Prosecutor) "Mr. Bufalino says there were tapes, why didn't the Government play the tapes?

I told you at the beginning of the trial this isn't like TV, where is the fingerprints?

You heard from the fingerprint expert.

Yes, there were tapes in this case.

I told you that at the beginning, but you had the real witnesses here.

Both Defendants have the tapes.

Now, they have no obligation whatsoever to present a defense. None. The burden is entirely on the Government.

But, if those tapes said anything different from what you heard from the stand, you would have heard them from the Defendants.

The tapes are of low quality.

MR. BUFALINO: Objection, Your Honor."

April 11, p. 191

13 "THE COURT: Mr. Bufalino's interjection of an objection to if there had been anything on the tape they would have heard from the Defendants I think is well taken.

You might have heard from the Defense Counsel, but you wouldn't be hearing from the Defendants.

MR. GARISH: I would like to join in that objection.

THE COURT: I do not think it's irreversible error and he's asking me for a mistrial on that basis.

But I propose to give an instruction to the Jury at this point and let's don't have it happen again.

MR. ALLEN: Your Honor, I will clean it up if I did, but I thought I had said defense not defendant.

THE COURT: You said defendants.

(concluded on page 15)

It is axiomatic that no reference may be made at trial to a defendant's failure to testify. *Griffin* v. *California*, 380 U.S. 609, 85 S Ct 1229, 14 L Ed 2d 106 (1965). The Sixth Circuit has consistently followed *Griffin* in reversing cases where they prosecutor violated the defendant's Fifth Amendment rights. In *Eberhardt* v. *Bordenkircher*, 605 F 2d 275 (6th Cir. 1979), the Court found impermissible the prosecutor's comment on the defendant's failure to present witnesses.[14]

(*continued from page 14*)

MR. BUFALINO: Just for the record, I would ask for a mistrial after you have denied it.

MR. GARISH: We both want to go on record with the same.

(The following proceedings were held in open Court in the presence of the Jury)

THE COURT: You will disregard in its entirety the last remark that Mr. Allen made, which doesn't really bear any repeating which would only emphasize it, I suppose.

But, as the Court will give you in its instruction, I'll give it to you again here now.

The law does not compel a defendant in a criminal case to take the witness stand and testify or to do anything.

And no presumption of guilt may be raised because they don't take the stand.

And no inference of any kind may be drawn from the fact that the defendant hasn't testified or hasn't put in any evidence at all.

Whether there are tapes or anything. Today's Detroit Free Press or anything.

As I stated to you I think before, and I'll state to you again, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence of any kind.

Do I make myself clear?

(Affirmative response from the Jury)

So you may disregard Counsel's earlier remarks and Counsel, please carry on."

April 11, p. 192

[14] **(Prosecutor closing argument) "Ask yourself, ladies and gentlemen, where the woman was who picked up this mysterious Dusty after the robbery — Mr. Gant. Where was she? Where were they? What other witnesses could the defendant's case have put forward who were totally available to you? What other witnesses? Ask yourself that question. Who else could have testified in this case?" at 278.**

The Court concluded that

> "We can only view the remarks of the prosecutor quoted above, together with the gesture toward the defendant, to be a clear comment on the failure of the defendant to take a stand."
>
> "It is impermissible for prosecutors to present arguments to the jury calculated to create in the jurors' minds an inference of guilt based solely on petitioner's election to remain silent, as we believe this argument clearly was. Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978). Hypothetical 'other witnesses', in a case where the comments are so clearly directed toward the defendant, do not eliminate the prosecutor's duty to avoid all such unfair and misleading argument, which places an unconstitutional burden on the defendant's exercise of his right not to testify," at 278.

In *United States* v. *Smith*, 500 F2d 293 (6th Cir. 1974), the Court had to decide whether the prosecutor's closing argument that the jury should require the defendants to present a reasonable explanation of the meaning of taped wire tapped evidence was improper.[15] The Court in *Smith* held that

> "The prosecutor's comments were improper because they had the effect of shifting the

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15 **(Prosecutor's closing argument) "If they were not engaged in the relationships that I have described for your, if there is any other reasonable explanation of the meaning for these calls other than what I have suggested the meaning, because if there is, in each and every instance — certainly the ones I have referred to in the opening argument, I would ask that the defendants satisfy you that there is no other reasonable explanation.**

If they have some reasonable alternatives to suggest as to what the calls mean, then I leave with you now, you then require them to show that to you," at 294.

> burden of proof from the government to the defendants and abrogating the presumption of innocence to which appellant's were entitled. They also focused the jury's attention on appellant's failure to testify and penalized, by implication, appellant's exercise of their constitutional privilege against self incrimination. We do not view the error as harmless and reverse the convictions and remand for a new trial," at 294.

The Court has even reversed convictions as violative of a defendant's Fifth Amendment rights were the prosecutor in closing argument has indicated that the evidence is "uncontradicted" and "unrebutted," *Lent* v. *Wells*, 861 F 2d 972 (6th Cir. 1988).

It is quite clear from the prosecutor's comments that he referred to the jury not hearing from the Defendants. If, however, it is contended that the prosecutor was not referring to actually hearing from the Defendants but to witnesses or evidence that the defense could present, the *Griffin* error is no less compelling.

In *United States* v. *Martin*, 696 F 2d 49 (6th Cir. 1983), the Court held that "If the government desires to request the jury to draw an adverse inference to the defendant because potential defense witnesses have not testified, the government must obtain an advance ruling from the court," at 53. The government in this case at no time sought a ruling from the Court as to the propriety of such an argument.

Although the government's argument did not directly request the jury to make an adverse inference, there was more than a strong implication that was what he asked them to do by questioning themselves as to why the defendants didn't call a witness who they claim would have been favorable for them.

In *Martin*, the Court found no error as the Court found that the prosecutor did not suggest that the jury draw an adverse inference and for the reason that the Court found that the missing witnesses were peculiarly within defendant's power to produce and thus the government could comment on that fact pursuant to *United States* v. *Blakemore*, 489 F2d 193 (6th Cir. 1973). In the instant case, the missing evidence, the tape recordings and the witnesses in support of those tape recordings, were certainly not witnesses peculiarly within the Defendant's power to produce. If anything, that evidence and the witnesses in support of that evidence was evidence and witnesses equally available to both parties. It is clear that no inference arises and no comment is permissible where a witness is equally available to both parties. *United States* v. *Arendale*, 444 F 2d 1260 (5th Cir. 1971).

D. The Prosecutor Improperly Attacked Appellant's Character By Making Reference In His Direct Examination Of A Witness And In Closing Argument To The Fear That The Witness Had Of Appellant.

The prosecutor in his redirect examination of witness, Thomas Meshinski asked of him whether he was afraid of anybody connected with the case.[16] It should be

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16 **(Redirect examination by prosecutor): "Q. Are you afraid of anything or anyone in connection with this case?**
A. Yes.
Q. Why?
A. I am afraid of not being able to walk out of here.
Q. Why do you have that fear? Are you afraid of a person?
A. Yes.
Q. Who?
A. Danny Fisher.
Q. Why?
MR. BUFALINO: Objection, your Honor. May we approach, sidebar conference?"

April 10, p. 201.

noted that this redirect examination was not prompted by any cross-examination of the witness. After a sidebar conference with the Court, no further questioning was pursued on this topic.

The prosecutor in his rebuttal closing argument again referred to this topic.[17]

It has long been established by common law tradition that the prosecution may not attempt to establish the probability of guilt of a defendant by evidence of a defendant's evil character. *United States* v. *Perry*, 512 F 2d 805 (6th Cir. 1975).

If, however, the defendant elects to take the stand and testify, he may be cross examined about prior convictions for the limited purpose of impeaching his testimony, *Perry*, *supra* at 806. Furthermore, if the defendant offers evidence of his reputation for good character, the government may rebut this evidence by reputation evidence as to bad character. *Wiley*, *supra*, and *United States* v. *Barker*, 553 F 2d 1013 (6th Cir. 1977).

The prosecutor at no time alerted the Court or the defense that he was going to attempt or introduce this type of evidence. Nor did he explain the legal basis for his attempt to introduce this type of evidence. If the basis was Federal Rule of Evidence 404[18], it clearly was not applicable.

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17 **(Rebuttal closing argument by prosecutor) "What did Mr. Meshinski told you? He was afraid of someone (indicating the defendants)." April 11, p. 198.**

18 **Rule 404 provides in relevant part:**

> **"(a) CHARACTER REFERENCE GENERALLY. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:**

(*concluded on page 20*)

It is clear that the suggestions of threats or fear are not admissible pursuant to Rule 404. See *United States* v. *Fortenberry*, 860 F 2d 628 (5th Cir. 1988).

In *United States* v. *Smith*, 403 F 2d 74 (6th Cir. 1968), the Court reversed a conviction where a government witness stated during questioning by the prosecutor that the defendant had just gotten out of prison. Even though a cautionary instruction was given by the Court, the Court found that "The probability that the incompetent evidence effected the outcome of the jury verdict is so strong that it resulted in an unfair trial for the defendant."

Likewise, in *Whiteside* v. *Bordenkircher*, 435 F Supp 68 (W.D. Ky, 1977), the Court granted a state habeas corpus conviction reversing an armed robbery conviction where the state prosecutor in his closing argument stated that the robbery victim was taking her life into her hands when she came to Court and testified.

In *United States* v. *Mitchell*, 556 F 2d 371 (6th Cir. 1977), the Court found the prosecutor's questioning of an informer witness as to his concerns for his life if he would be incarcerated due to the dangerous propensities of the defendant "skirts if it does not exceed, the outer bounds of proper advocacy," at 381. The Court,

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(*continued from page 19*)

> (1) **CHARACTER OF ACCUSED. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;"**
>
> * * *
>
> **"(b) OTHER CRIMES, WRONGS OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."**

however, found this line of inquiry not to be prejudicial in the *Mitchell* case because it was proper rebuttal to cross examination of the informer as to his agreements with the government including protection and care for himself and his family.

In the instant case, there was no excuse or justification for the line of questioning as to fears of the witness. It was not proper redirect examination as to any areas brought up in cross examination of the witness that would merit this line of inquiry.

In determining whether the complained of instances of prejudicial misconduct is reversible or harmless error, the Court "considers the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidently placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused." *Leon*, *supra* at 679.

The Sixth Circuit has further stated that "specifically with regard to prosecutorial misconduct in closing argument, that error may be harmless only if the proof against the defendant is 'overwhelming'." *Whiteside*, *supra*, at 71. Petitioner submits that an isolated error may be considered harmless, but the cumulative effect of continued improper argument by the prosecutor can only be considered prejudicial and reversible error.

There can be no question that the complained of remarks were introduced to prejudice the accused before the jury. The complained of comments by the prosecutor were of an inflammatory nature: commenting on the Petitioner's failure to introduce evidence, denigrating the comments of defense counsel, alluding to the drug problem facing society, and sug-

gesting threats to government witnesses. The remarks of the prosecutor cannot be considered isolated as they were extensive as evidenced by the several complained of areas of misconduct. It is also submitted that they can only be considered to be deliberately placed before the jury. The very nature of the inflammatory topics encompassed by the complained of comments can only be considered deliberate as they were comments that were outside the normal flow of the facts of the case and the trial.

As to the strengths of the case as to FISHER, it is submitted that the entire case was based on the testimony of Steven Thomson. It should be recalled that initially FISHER wasn't even indicted with Thomson and Silvestri. Obviously at that point in time the government did not have sufficient evidence to indict FISHER let alone convict him. It was only after Thomson made a deal with the government and offered to testify were charges brought against FISHER. Besides Thomson's testimony, the only evidence pertaining to FISHER's involvement in this case was the fact that Silvestri initially rented a room at FISHER's docking depot and later rented two rooms at a home owned by FISHER. FISHER was observed putting in a vent in the depot and helping Silvestri move some items into the rooms and later was observed at the premises on one occasion. He had no contacts with the undercover agent other than on one occasion telling her and Mitchell that a package had been left for them in a file cabinet. When arrested, he had no controlled substances or recorded funds on his person, unlike Silvestri. McGladdery indicated that at one time when he was at the trucking depot, FISHER said to him "Oh, you are here to get some of that shit." There was thus no evidence of FISHER's involvement in any drug conspiracy or attempts to manufacture or deliver amphetamines. It cannot even be argued that he

had knowledge or was merely present where such activities took place as there is no evidence other than Thomson's testimony that FISHER was aware of Silvestri's activities and knowingly and willingly participated in those activities.

This Court has further commented on the basis of a review of a claim of prosecutorial misconduct. In *Solivan, supra*, the Court indicated that on appeal it was guided by the standards set forth in *Chapman* v. *California*, 386 U.S. 18, 87 S Ct 824, 17 L Ed 2d 705 (1967), to determine whether constitutional error is harmless error or whether reversible error has resulted from improper evidence or improper argument. The Court in *Solivan, supra*, found that "If there is a reasonable possibility that the evidence or comment complained of might have contributed to the conviction, then such error cannot be harmless beyond a reasonable doubt," at 1155.

It should be noted that the only time the Court intervened in regard to these complained of errors was when the prosecutor commented on the defendant's not putting in evidence. The Court gave a questionary instruction at that time. The Court also gave similar instructions in its charge to the jury as to the Petitioner having no obligation to testify or present evidence.

Due, in part, to the lack of Court intervention in the complained of actions and comments of the prosecutor, it is submitted that these comments were improperly considered by the jury in arriving at their verdict. Even where proper cautionary instructions are given, it is often been held not to cure the harm.

In *United States* v. *Steinkoetter*, 593 F 2d 747 (6th Cir. 1979), this Court reversed a conviction where the government attorney made inflammatory and prejudicial

comments in his opening statement that were not supported by the record. Reversal was mandated even though the trial court struck the objectionable material and admonished the jury to disregard it for "it would have been impossible for the jury completely to obliterate such comment from the United States Attorney from their memory in weighing the evidence in this case," at p. 749.

As was stated in *Krulewitch* v. *United States*, 336 US 440, 453, 669 S Ct 716 92 L Ed 790, 799 (1949) (Jackson concurring):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."

Prejudice is magnified by the cumulative effect of repeated improper conduct. *Smith*, *supra*, at p. 76; *Whiteside*, *supra*, at p. 71; *Perry*, *supra*, at p. 806.

> "This circuit has condemned the practice of some government attorneys who introduce prejudicial evidence that they should know is inadmissible, or who argue to the jury about matters not properly introduced into evidence or inferable from the evidence. There have been instances where we have had to reverse convictions for prosecutorial overkill where there was sufficient evidence to go to the jury and support a conviction." *Leon*, *supra* at 679. See *United States* v. *Calvert*, 498 F 2d 409 (6th Cir. 1974).

The Sixth Circuit in the instant case thought the prosecutor's comment about the drug problem to be inappropriate. The Court further found that the government's questions about and references to a witness's fear of FISHER also to be inappropriate (J. Keith, concur-

ring, found such action by the government to be "deplorable".) Nonetheless the Court affirmed FISHER's conviction by applying the plain error standard of review based on defense counsel's failure to object and state the basis for his objection. The testimony pertaining to the witness's fear was objected to by counsel for Petitioner's co-defendant. The trial court however at the beginning of the trial had indicated that an objection voiced by one counsel would stand for all. Petitioner attempted to bring this to the appeals court's attention in his motion for remand and to hold the rehearing schedule and mandate in abeyance. In addition, Petitioner desired a remand to make a record of a sidebar conference that was not recorded where FISHER's trial counsel did in fact join in his co-counsel's objection. These motions were denied by the Appeals Court.

Federal Rule of Criminal Procedure 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

> "The plain error doctrine of Federal Rule of Criminal Procedure 52(e) tempers the blow of a rigid application of the contemporaneous objection requirement. The rule authorizes the Courts of Appeals to correct only 'particularly egregious errors,' . . . those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' . . . ." *United States* v. *Young*, 470 US 1, 84 L Ed 2d 1, 105 S Ct 1038 (1985).

This Court has held that Rule 52(b) to be merely a restatement of existing law and that its purpose is to mitigate the "harsh impact of the adversarial system, under which the defendant is generally bound by the conduct of his lawyer, but providing relief in exceptional

cases despite the lawyer's failure to object at trial." *United States* v. *Frady*, 456 US 152, 71 L Ed 2d 816, 102 S Ct 1584 (1982).

Of significance in the instant case is that the prosecutor's inappropriate remarks in closing argument and in the questioning of the one witness was not an isolated incident but was repeated and persistent. Such repeated acts of misconduct must be viewed as to their probable cumulative effect on the jury as opposed to a slight effect from a single instance of misconduct. See *Berger, supra.*

The Appeals Courts face issues of prosecutorial misconduct on a steady basis. Unfortunately, little is done to right the wrong that the courts acknowledge exist. It is this Court's obligation to set the standard and reaffirm the obligations of government attorneys established in the *Berger* case over 50 years ago.

In *Darden* v. *Wainwright*, 477 US 168, 91 L Ed 2d 144, 106 S Ct 2464 (1986), this Court observed

> "Twice during the past year — in United States v Young, 470 US 1, 84 L Ed 2d 1, 105 S Ct 1038 (1985), and again today — this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:
>
> > 'This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an atti-

> tude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, "Government attorneys, without fear of reversals, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial." Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court — recalling the bitter tear shed by the Walrus as he ate the oysters — breeds a deplorably cynical attitude towards the judiciary' (footnote omitted). United States v Antonelli Fireworks Co., 155 F2d 631, 661, cert denied, 329 US 742, 91 L Ed 640, 67 S Ct 49 (1946)."

(J. Blackmun, with whom J. Brennan, J. Marshall, and J. Stevens joined, dissenting).

CONCLUSION

This Court should grant Petitioner's Petition for Writ of Certiorari to decide this important question of federal law. In the alternative, this Court should remand this case to the United States Court of Appeals for the Sixth Circuit with directions to allow Petitioner to have the case remanded for a clarification of the contemporaneous objection issue and allow Petitioner to file for a re-hearing in the Court of Appeals.

Respectfully submitted,

By: /s/ EDWARD WISHNOW (P22472)
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Dated: October 13, 1992

APPENDIX TO PETITION FOR CERTIORARI

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ORDER DENYING MOTIONS TO REMAND, TO HOLD REHEARING SCHEDULE IN ABEYANCE, AND TO STAY THE MANDATE

(United States Court of Appeals — Sixth Circuit)

(Filed September 15, 1992)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DANNY FISHER, Defendant-Appellant — Case No: 91-1906)

The appellant has filed a motion to remand, to hold rehearing schedule in abeyance, and to stay the issuance of the mandate. The appellee has responded in opposition.

Upon consideration, it is ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green,
Clerk

OPINION

-Not For Publication-

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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(United States Court of Appeals — Sixth Circuit)

(Filed July 21, 1992)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS SILVESTRI and DANNY FISHER, Defendants-Appellants — Nos. 91-1870/1906; On Appeal from the United States District Court for the Eastern District of Michigan)

Before: KEITH and RYAN, Circuit Judges;
and KRUPANSKY, Senior Circuit Judge.

RYAN, Circuit Judge.

This case presents the consolidated appeals of defendants Thomas Silvestri and Danny Fisher. Silvestri appeals from his jury conviction on nine counts arising from his involvement in a conspiracy to manufacture and distribute amphetamine, 21 U.S.C. §§ 841, 843, 846, 856, 858, and 18 U.S.C. § 2. Fisher appeals from his jury conviction on five counts arising from the same conspiracy, 21 U.S.C. §§ 841, 846, 856, and 18 U.S.C. § 2.

Both defendants raise issues relating to alleged prosecutorial misconduct during rebuttal closing argument:

1. Whether the prosecutor committed reversible error when he referred to the defendants' failure to play certain tapes that were not introduced into evidence?

2. Whether the prosecutor committed reversible error when he referred to the drug problem in this country?

Fisher raises two separate issues:

1. Whether the prosecutor committed reversible error when he questioned a witness about that witness' fear of Fisher and later commented on this fear during closing argument?

2. Whether the prosecutor committed reversible error when he denigrated the view of Fisher's trial counsel during rebuttal closing argument?

We conclude that the defendants' convictions should be affirmed.

I.

This prosecution arose from an operation to manufacture and distribute amphetamine that involved three people: Silvestri, a chemist who manufactured the drug; Fisher, owner of the two locations where Silvestri manufactured the drug; and cooperating co-conspirator Steven Thomson, a Fisher employee who distributed the amphetamine. The conspiracy involved two locations in Detroit, both owned by Fisher. One was the Thomson Trucking depot on Jefferson. Thomson managed Thomson Trucking for Fisher, and Silvestri initially manufactured the amphetamine at the depot. The other was a residence on Falcon Street, where Silvestri later manufactured the amphetamine.

In October 1989, Silvestri set up a lab to produce amphetamine at Thomson Trucking. In December 1989, the lab was dismantled, and in January and February 1990, Silvestri, Fisher, and Thomson moved equipment

to the Falcon Street residence, where a new lab was set up in part of the house. In January 1990, an employee of Thomson Trucking began cooperating with DEA investigators as a paid informant. With his cooperation, a DEA agent made three controlled buys of amphetamine from Thomson in March 1990. After these buys, Thomson and Silvestri were arrested at the depot. Silvestri had on his person prerecorded government funds from the three prior sales. A search of the depot revealed papers connecting Fisher to the Falcon Street residence, and a subsequent search of the residence resulted in the discovery of the second amphetamine-manufacturing lab.

In August 1990, an indictment charged Silvestri and Thomson with manufacturing, possessing with intent to distribute, and distributing amphetamine. Subsequently, Thomson pleaded guilty, and became a government witness. In January 1991, a superseding indictment was filed, omitting charges against Thomson but adding charges against Fisher.

In April 1991, Silvestri and Fisher were tried before a jury. The jury found Silvestri and Fisher guilty on all counts. The district court sentenced Silvestri to 235 months imprisonment followed by 3 years supervised release, and Fisher to 151 months imprisonment followed by 3 years supervised release. Both defendants timely appeal their convictions.

II.

A. PROSECUTOR'S COMMENT ON DEFENDANTS' FAILURE TO PLAY TAPES

Silvestri and Fisher contend that the prosecutor violated their fifth amendment rights when, in his rebuttal closing argument, he referred to their failure to play tapes of conversations recorded on listening devices worn by a DEA agent and Thomson.

During closing argument, counsel for defendant Silvestri questioned the government's motive for not playing the tapes. In his rebuttal, the prosecutor stated:

> Yes, there were tapes in this case.
>
> I told you that at the beginning, but you had the witnesses here.
>
> Both Defendants have the tapes.
>
> Now, they have no obligation whatsoever to present a defense. None. The burden is entirely on the Government.
>
> But, if those tapes said anything different from what you heard from the stand, you would have heard them from the Defendants.
>
> The tapes are of low quality.
>
> MR. BUFFALINO [counsel for Silvestri]: Objection, Your Honor.

After a short sidebar conference, the district court gave the jury a lengthy curative instruction, directing the jury to disregard the prosecutor's comments and informing the jurors that they may not draw any inference from the defendants' decisions not to testify or play the tapes.

We emply a two-part analysis to determine whether the prosecutor's comments constituted reversible error. The first inquiry is whether the prosecutor's statements amounted [*to*] constitutional error. If yes, the second question is whether the error is harmless? Because we find that the prosecutor's comments were not constitutional error, we do not reach the harmless error inquiry.

The constitutional error inquiry requires that we determine whether the prosecutor's comments infringed on the defendant's privilege against self-incrimination. The government argues that the prosecutor's comments were a fair response to statements made by defense counsel. We agree.

The Supreme Court has held that a prosecutor's reference to a defendant's failure to testify does not violate the privilege against self-incrimination if the reference is a fair response to a defendant's argument. *United States* v. *Robinson*, 485 U.S. 25, 32 (1988). The Court specifically stated that there was a difference between treating silence as substantive evidence of guilt and adverting to that silence when responding to a defendant's argument. *Id.* at 34. This circuit has applied this doctrine in *United States* v. *Pearce*, 912 F.2d 159 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 978 (1991). Although the prosecutor in *Pearce* referred to the defendant's failure to call a particular witness, the court found no prejudicial error, reasoning: "Defense counsel had implied that the government had an improper motive for not calling [the witness] to testify. The government's remarks were an attempt to respond to the defense's prior assertion. . . ." *Id.* at 164.

In this case, defense counsel implied that the government had an improper motive for not playing tapes of conversations. He argued that the government had not "really wanted to tell you [the jury] what was going on." The prosecutor responded that if the tapes "were different from what you heard on the stand, you would have heard them from the defendants." The prosecutor's comment did not treat defendants' failure to testify as an admission of guilt. Rather, it was a fair response to the defendant's argument, and did not infringe on the defendant's fifth amendment rights.

B. REFERENCE TO NATION'S DRUG PROBLEM

Both defendants argue that the prosecutor's reference to the country's drug problem distracted the jury from the facts of the case and indirectly attempted to convince the jury to convict the defendants as a blow against society's drug problem. In his rebuttal, the prosecutor stated:

> The Government has much better things to do with itself than chase Thomas Silvestri and Danny Fisher.
>
> The drug problem in this Country is of a magnitude way too large for the Government to waste its time with people that have been sucked into something by two bought witnesses.

We note that neither defendant objected to the prosecutor's statement. Lacking an objection, we analyze the statement under the plain error standard. Errors not brought to the attention of the trial court may be noticed if they are plain errors. Fed. R. Crim. P. 52(b). "Plain errors are limited to those harmful ones that so rank that they should have been apparent to the trial judge without objection, or that strike at the fundamental fairness, honesty, or public reputations of the trial." *United States* v. *Causey*, 834 F.2d 1277, 1281 (6th Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988). We must determine whether the error was so plain that "the trial judge and prosecutor were derelict in countenancing it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Appellate courts should apply the plain error doctrine only in exceptional cases. *United States* v. *Evans*, 883 F.2d 496, 499 (6th Cir. 1989).

In evaluating a prosecutor's remarks, this court should consider the potential the remarks have to prejudice the defendant and confuse the jury and the strength of the proof against the defendant. *United States* v. *Castro*, 908 F.2d 85, 89 (6th Cir. 1990). "Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible." *United States* v. *Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991).

We feel that the prosecutor's comment about the drug problem was inappropriate; we must, however,

determine whether permitting the comment constituted plain error. We conclude that it did not. The comment was not calculated to incite the passions of the jury, in light of the fact that the prosecutor did not ask the jury to convict Silvestri and Fisher because they were part of society's drug problem. Rather, the prosecutor was, to some degree, responding to the defense argument that the government manufactured its case with "bought witnesses."

The comment was not so prejudicial as to strike at the fundamental fairness of the trial, and permitting it did not constitute plain error.

C. QUESTIONS ABOUT AND RFFERENCE TO WITNESS' FEAR OF FISHER

Fisher raises two issues independently of Silvestri. Fisher argues first that Thomas Meshinski's testimony, that he feared Fisher, was not relevant and was inadmissible under Fed. R. Evid. 404(b). Fisher also contends that the prosecutor's reference to this testimony during rebuttal closing argument prejudiced the jury.

Meshinski's testimony detailed Fisher's involvement in leasing the space for, and helping set up, the lab in the Falcon Street residence. On redirect examination by the prosecutor, the following exchange occurred:

> Q: Are you afraid of anything or anyone in connection with this case?
> A: Yes.
> Q: Why?
> A: I am afraid of not being able to walk out of here.
> Q: Why do you have that fear? Are you afraid of a person?
> A: Yes.
> Q: Who?

A: Danny Fisher.
Q: Why?
MR. BUFALINO [counsel for Silvestri]: Objection, your Honor.

Following a sidebar conference that, inexplicably was not on the record, the prosecutor resumed questioning on another topic.

In his rebuttal closing argument, the prosecutor briefly referenced this testimony: "What did Mr. Meshinski told [sic] you? He was afraid of someone."[1] Neither defendant objected to this reference.

The actions at trial of defense counsel, the prosecutor, and the district court make this issue very difficult to review. The sidebar conference was off the record, leaving this court to guess at what motions, if any, defense counsel made and how the district court responded. We will, however, infer that the district court instructed the government to cease its line of questioning, effectively sustaining the objection.

In his submission to this court, Fisher argues that the admission of the evidence of Meshinski's fear was error because it violated Fed. R. Evid. 404(b). We note initially that, based on our review of the record, the prosecutor's redirect questions were beyond the scope of cross-examination, and, as such, the entire line of questioning was inappropriate. Fisher, however, did not object at trial on this basis, nor does he urge this argument to this court. Therefore, we consider the argument waived.

Nevertheless, as to Fisher's Rule 404(b) argument, we agree that the evidence, as adduced at trial, was in-

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[1] **The reporter noted that as the prosecutor said this, he was "Indicating the Defendants."**

admissible. The government relies on the proposition that evidence of an accused's threats against a witness is admissible. This court has adopted this principle, holding that threats against a witness are admissible under Rule 404(b) to show consciousness of guilt. *United States* v. *Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986), *cert. denied*, 480 U.S. 922 (1987).

What the government apparently does not appreciate, however, is that because of the district court's apparent decision to disallow further questioning of Meshinski on this subject, no actual evidence of any threats by Fisher was presented to the jury. Further, because the government failed to make an offer of proof, there is nothing in the record to show that Fisher ever made such threats. As a result, there is no basis in the record for admitting Meshinski's testimony. The jury did not hear testimony, admissible under Rule 404(b), about acts of Fisher that prove consciousness of guilt; instead, the jury only heard testimony about Meshinski's unexplained fear of Fisher. This testimony was inadmissible under Rule 402 because it was not relevant.[2]

The unfortunate result of the exchange was to suspend before the jury an unsupported inference that Fisher may have threatened Meshinski. The record does not reveal any basis for such an inference, and absent proof that Fisher threatened Meshinski, the testimony that Meshinski feared Fisher was inadmissible because it was irrelevant.

Our inquiry does not, however, end here. A close examination of the record reveals that Fisher failed to preserve this issue for review. We reach this conclusion

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[2] **Rule 404(b), technically speaking, is not at issue, since the government did not adduce any evidence about crimes, wrongs, or acts of Fisher.**

for several reasons. First, we note that Fisher counsel's [*sic*] failed to object to the questioning of Meshinski — the only objection came from Silvestri's counsel, and the record does not reveal that Fisher joined in the objection. Second, the only objection made at trial was the single word, "Objection." The specific ground urged on appeal, violation of Rule 404(b), was not suggested to the trial court. As such, the objection fails to preserve the issue for review. *Mendez-Ortiz*, 810 F.2d at 78. Third, we note that not only did Fisher fail to object to the questioning of Meshinski, neither did Fisher object to the effect of the exchange, that is, the existence of a damaging inference that Fisher threatened Meshinski. The record does not reveal a request from Fisher that Meshinski's testimony be stricken, nor does the record reveal a request for a curative instruction.

As a result, we review this issue under the plain error standard of review. Although we feel that allowing the jury to hear Meshinski's testimony, and thereby inappropriately suggesting to the jury that Fisher may have entertained a consciousness of guilt, we conclude that it did not constitute plain error. To the extent that Meshinski's testimony created an inference that Fisher was conscious of his own guilt, we note that Meshinski's testimony was cumulative of testimony that Fisher attempted to bribe Thomson, demonstrating a similar consciousness. In addition, permitting the jury to hear the testimony did not "strike at the fundamental fairness" of the trial. *Causey*, 834 F.2d at 1281. Fisher's guilt was clear, and more than ample evidence implicated him in the amphetamine conspiracy. Meshinski's answers to a few inappropriate questions did not constitute plain error.

We reach the same conclusion as to the prosecutor's reference to Meshinski's fear during rebuttal closing

argument. We note that Fisher failed to object to this reference and thus we again use the plain error standard. That fact that the jury heard the prosecutor's one-sentence reference to Meshinski's fear did not constitute plain error.

D. PROSECUTOR'S DENIGRATION OF FISHER'S TRIAL COUNSEL

Fisher argues second that during rebuttal closing argument, the prosecutor impermissibly suggested that defense counsel's opinion was irrelevant. In his rebuttal, the prosecutor stated to the jury: "You are the judges of credibility. What Mr. Garish [trial counsel for Fisher] thinks doesn't matter." Counsel for Fisher did not object.

Lacking an objection, we analyze the prosecutor's statement under the plain error standard. Viewed in the proper context, the prosecutor merely reminded the jury that it was the proper judge of the credibility of the witnesses. Permitting this comment was not plain error.

III.

The convictions of Fisher and Silvestri are affirmed.

DAMON J. KEITH, Circuit Judge, concurring.

I concur in the majority opinion, but write separately to express my strong opposition to the prosecution's use of unsubstantiated and improper character evidence against Fisher. As the majority recognizes, Meshinski's testimony that he was afraid of Fisher was inappropriate and inadmissible. I agree, however, that the governing standard of review precludes us from reversing the district court.

I find the prosecution's use of Meshinski's testimony very troubling. While the prosecution suggested at oral argument that there was a basis for admitting this evidence, the prosecution concedes that that basis was not established at trial. The record fails to reveal the reason for this failure. In any case, questions about Meshinski's alleged fear of Fisher ceased after a sidebar conference with the district judge and, as noted by the majority, we can assume that the district court instructed the prosecution to cease its line of questioning. The prosecution, however, again referenced the unsubstantiated character evidence during closing arguments.

I find the prosecution's repeated use of this character evidence inexcusable. It is hard to believe that the prosecution was unaware that reference to the unsubstantiated character evidence during closing argument was inappropriate. The prosecution should also have been aware of the potential for prejudice from its repetitive use of this evidence. I find such action by the government to be deplorable.

Despite my misgivings in this case, defense counsel's failure to state the basis of its objection to this testimony severely limits this Court. Under the plain error standard of review and those mitigating circumstances stated by the majority, I must reluctantly join in the majority decision to AFFIRM.

MOTION FOR REMAND

(United States Court of Appeals — Sixth Circuit)

(Dated August 7, 1992)

(UNITED STATES OF AMERICA, Plaintiff/Appellee, -v- DANNY FISHER, Defendant/Appellant – Case Nos. 91-1906)

NOW COMES Defendant/Appellant, DANNY FISHER, by his attorney, Edward Wishnow, and in making a Motion for Remand says as follows:

1. This case is before this Court on a direct appeal of Defendant's Judgment of Conviction in the United States District Court for the Eastern District of Michigan for violations of 21 USC 841.

2. This Court entered an opinion on July 21, 1992, affirming Defendant/Appellant's Judgment of Conviction.

3. That Defendant/Appellant's appeal involved serious claims of prosecutorial misconduct.

4. That this Court in affirming Defendant's conviction applied the plain error standard of review based on the record failing to reflect that Appellant's counsel preserved issues for review.

5. That Defendant's trial counsel did in fact preserve issues for review by making the appropriate objections to the prosecutorial misconduct as argued in Appellant's Brief, but said objections were not part of the record as they were made at side bar conferences that were conducted during the course of the trial.

6. That a remand is requested and in the interest of justice required to make a record in the trial court as to the substance of side bar conferences that were held but not recorded pertaining to the objectionable conduct of the government attorney.

7. That the affidavit of George Garis, the trial attorney for Appellant, DANNY FISHER, is attached hereto and made a part hereof.

WHEREFORE, Defendant/Appellant requests that this Court remand this case to the trial court, the Eastern District of Michigan, Southern Division, the Honorable George E. Woods presiding, for purposes of an evidentiary hearing to make a record of the side bar conferences referenced herein.

Respectfully submitted,

By: /s/ EDWARD WISHNOW (P22472)
Attorney for Defendant/Appellant
17117 West Nine Mile Road, Suite 1040
Southfield, Michigan 48075

Dated: August 7, 1992

AFFIDAVIT IN SUPPORT OF MOTION FOR REMAND

STATE OF MICHIGAN
COUNTY OF OAKLAND — ss.

EDWARD WISHNOW, being first duly sworn, deposes and says:

That he has read the foregoing Motion For Remand by him subscribed;

That he knows the contents thereof and same are true to the best of his information and belief.

EDWARD WISHNOW

(*Jurat Omitted*)

AFFIDAVIT OF GEORGE S. GARIS

STATE OF MICHIGAN
COUNTY OF OAKLAND — ss.

GEORGE S. GARIS, being first duly sworn, deposes and says:

1. That he is an attorney licensed to practice in the State of Michigan and the federal courts.

2. That he was the trial attorney for Defendant/Appellant, DANNY FISHER in the above matter.

3. That on Wednesday, April 10, 1991, a side bar conference was held with the judge pertaining to an objection raised by the defense pertaining to the government's re-direct examination of a witness, Thomas Meshinski, wherein the government elicited from the witness that he was afraid of the Defendant, DANNY FISHER.

4. That a copy of the transcript confirming that a side bar conference was held is attached hereto.

5. That at the side bar conference affiant objected to this line of questioning as being irrelevant and prejudicial.

6. That at the side bar conference affiant further requested that the objected-to testimony be stricken and that a cautionary instruction be given by the Court which the Court refused to give.

Further deponent saith not.

/s/ GEORGE S. GARIS

(Jurat Omitted)

[*ATTACHED TRANSCRIPT COPY*]

(201) * * * *Redirect Examination*

BY MR. ALLEN:

Q. Mr. Meshinski, are you nervous?
A. Yes.
Q. Why?
A. I don't know.
Q. Have you ever testified before?

A. No, not like this.

Q. Are you afraid of anything or anyone in connection with this case?

A. Yes.

Q. Why?

A. I am afraid of not being able to walk out of here.

Q. Why do you have that fear? Are you afraid of a person?

A. Yes.

Q. Who?

A. Danny Fisher.

Q. Why?

MR. BUFALINO: Objection, your Honor. May we approach, sidebar conference?

(A sidebar conference was had
with all counsel present, off the record.)

(202) THE COURT: Back on the record. Carry on, Counsel.

Q. (By Mr. Allen): Mr. Meshinski, I would like to go over a little bit of the testimony that you have given in response to Mr. Bufalino and Mr. Garis's questions.

Mr. Bufalino asked you some questions about whether you paid the rent for December or whether it was January or February. Did you ever give money to Mr. Fisher for rent, whether it's full payment or not?

A. Not that I can recall.

Q. And now, the incident with the payment for the water, do you recall that incident?

A. Yes.

Q. You and Mr. Silvestri drove down. He gave you money and you paid for the water bill?

A. Yes.

Q. What was that intended to cover?

A. The first month's rent.

Q. And which is the first month that Mr. Silvestri was in the house?

A. January.

Q. So whether you did it in December or whether you did it in January, when you actually went down, it was for the January rent?

A. Yes.

* * *

MOTION TO HOLD RE-HEARING SCHEDULE IN ABEYANCE AND FOR AN ORDER TO STAY THE MANDATE

(United States Court of Appeals — Sixth Circuit)

(Dated August 7, 1992)

(UNITED STATES OF AMERICA, Plaintiff/Appellee, -v- DANNY FISHER, Defendant/Appellant – Case Nos. 91-1906)

NOW COMES Defendant/Appellant, DANNY FISHER, by his attorney, Edward Wishnow, and in support of his Motion to hold the re-hearing schedule in abeyance and for an order to stay the mandate says as follows:

1. This case is before this Court on a direct appeal of Defendant's Judgment of Conviction in the United States District Court for the Eastern District of Michigan for violations of 21 USC 841.

2. This Court entered an opinion on July 21, 1992, affirming Defendant/Appellant's Judgment of Conviction.

3. That Defendant/Appellant's appeal involved serious claims of prosecutorial misconduct.

4. That this Court in affirming Defendant's conviction applied the plain error standard of review based on the record failing to reflect that Appellant's counsel preserved issues for review.

5. That Defendant's trial counsel did in fact preserve issues for review by making the appropriate objections to the prosecutorial misconduct as argued in Appellant's brief, but said objections were not part of the record as they were made at side bar conferences that were conducted during the course of the trial.

6. That a remand is necessary and Appellant has filed contemporaneous with this Motion a motion for remand to the District Court to make a record of the

side bar conferences that pertain to the objectionable conduct of the government.

7. That Appellant is incarcerated and serving his 151 month term of imprisonment.

8. That an order is requested and in the interests of justice should be granted holding the re-hearing schedule to be held in abeyance and staying the mandate until Appellant's motion for remand to the District Court is decided by this Court and a record is made in the District Court.

9. That Appellant is incarcerated at the McKean Federal Correctional Institution in Bradford, Pennsylvania, and counsel has had difficulty in communicating in a timely fashion with Appellant as to post conviction decisions.

WHEREFORE, Defendant/Appellant requests that this Court hold the re-hearing schedule in abeyance and stay the mandate in this case until the matter of a remand to make a record is concluded.

Respectfully submitted,

By: /s/ EDWARD WISHNOW (P22472)
Attorney for Defendant/Appellant
17117 West Nine Mile Road, #1040
Southfield, Michigan 48075

Dated: August 7, 1992

AFFIDAVIT IN SUPPORT OF MOTION TO HOLD RE-HEARING SCHEDULE IN ABEYANCE AND FOR AN ORDER TO STAY THE MANDATE

STATE OF MICHIGAN
COUNTY OF OAKLAND — ss.

EDWARD WISHNOW, being first duly sworn, deposes and says:

That he has read the foregoing Motion To Hold Re-Hearing Schedule In Abeyance And For An Order To Stay The Mandate by him subscribed;

That he knows the contents thereof, and same are true to the best of his information and belief.

EDWARD WISHNOW

(*Jurat Omitted*)

ADDENDUM TO MOTION TO HOLD RE-HEARING SCHEDULE IN ABEYANCE AND FOR AN ORDER TO STAY THE MANDATE

–(United States Court of Appeals — Sixth Circuit)

(Dated September 11, 1992)

(UNITED STATES OF AMERICA, Plaintiff/Appellee, -v- DANNY FISHER, Defendant/Appellant – Case No. 91-1906)

NOW COMES Defendant/Appellant, DANNY FISHER, by his attorney, Edward Wishnow, and as an Addendum to his Motion To Hold Re-Hearing Schedule In Abeyance And For An Order To Stay The Mandate previously filed says as follows:

1. That this Court in its opinion of July 21, 1992, affirming Defendant/Appellant's judgment of conviction applied the plain error standard of review based on Appellant's trial counsel failing to preserve issues for review.

2. That in particular as to Appellant's Claim that the government improperly referenced a witness fear of Appellant, this Court in its opinion noted that Appellant's trial counsel failed to object to the line of questioning that the Court found to be inappropriate; and Judge Keith, concurring, found to be deplorable.

3. The Court in its opinion noted that the objection as to the inappropriate line of questioning came from co-defendant's counsel and not from Appellant's counsel.

4. The Court's conclusion is incorrect as Appellant's counsel was deemed to have preserved the issue when co-defendant's counsel objected as the trial court at the commencement of trial ruled that an objection made by one defense counsel would apply to other counsel unless specifically disavowed. (See attached transcript page 3 of April 9, 1991, trial date.)

WHEREFORE, Defendant/Appellant requests that this Court hold the re-hearing schedule in abeyance and stay the mandate in this case until the matter of a remand has been resolved by the Court and then allow Appellant to petition for re-hearing based on the facts as presented by this addendum.

Respectfully submitted,

By: /s/ EDWARD WISHNOW (P22472)
Attorney for Defendant/Appellant
17117 West Nine Mile Road, Suite 1040
Southfield, Michigan 48075

Dated: September 11, 1992

[*ATTACHED TRANSCRIPT COPY*]

(3) Detroit, Michigan
Tuesday, April 9, 1991
11:15 o'clock a.m.

THE COURT: The jury is coming in.

MR. ALLEN: One more matter before the jury comes in. I would just like to put on the record, I have given both counsel copies of the Grand Jury testimony of the witnesses, and also two statements of other witnesses that represent Jencks material, as well as Brady material, and the plea for the co-defendant who has pled out, and the criminal records of two of the witnesses.

Thank you, your Honor.

MR. BUFALINO: I acknowledge receipt of that also.

THE COURT: By the way, during the course of this trial, gentlemen, when an objection is made from defense counsel, whoever makes it, it goes without saying that the objection is across the Board unless the other counsel wants to specifically disavow it so that you don't have to both be popping up.

If one makes an objection, it covers both of you.

MR. BUFALINO: Thank you, sir.
MR. GARIS: Thank you, Judge.
THE COURT: The jury is coming in now.

(The jurors re-entered the courtroom.)

(2)

FILED
DEC 21 1992
OFFICE OF THE CLERK

No. 92-699

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANNY FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals properly found no error in comments made by the prosecutor at petitioner's trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-699

DANNY FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A13) is unpublished, but the judgment is noted at 968 F.2d 1217 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1992. The petition for a writ of certiorari was filed on October 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of distributing

methamphetamine, 21 U.S.C. 841(a)(1), one count of unlawfully establishing a methamphetamine laboratory, 21 U.S.C. 856, and one count of conspiracy to manufacture and distribute methamphetamine, 21 U.S.C. 846. He was sentenced to 151 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A2-A13.

1. Petitioner owned a trucking depot and a residence in Detroit, Michigan. Petitioner installed plumbing and a ventilation system in a room at the trucking depot, which was managed by Steven Thomson. In October of 1989, Thomas Silvestri, a chemist, set up a laboratory and manufactured methamphetamine there. The laboratory was dismantled in December, and in January and February of 1990 the conspirators moved the equipment to the residence, where Silvestri resumed manufacturing methamphetamine. Pet. App. A3-A4.

Elton Mitchell, an employee of the trucking company who had helped dismantle the laboratory at the depot, began cooperating with the Drug Enforcement Administration (DEA) in January of 1990. With Mitchell's assistance, an undercover DEA agent made three controlled purchases of methamphetamine from Thomson in March of 1990. Thomson and Silvestri were arrested at the depot on March 20, 1990. Papers found at the depot following the arrests connected petitioner to the residence, a search of which revealed the methamphetamine laboratory. Thomson pleaded guilty prior to trial and testified against his co-conspirators. Silvestri was tried with petitioner and

convicted on nine counts relating to the drug conspiracy. Pet. App. A4.

2. On appeal, petitioner claimed that prosecutorial misconduct entitled him to a new trial. He identified four remarks by the prosecutor during closing argument that he considered improper: a comment on the failure of the defense to produce a particular piece of evidence; reference to this country's drug problems; a comment allegedly denigrating petitioner's counsel; and a reference to testimony about a witness's fear of petitioner. The court of appeals held that the prosecutor's remarks did not deprive petitioner of a fair trial. Pet. App. A4-A12.

ARGUMENT

1. Petitioner claims (Pet. 13-18) that the prosecutor violated his Fifth Amendment rights by referring to the ability of the defense to put on certain evidence.

During closing argument, counsel for Silvestri questioned the government's motive for not playing tape recordings of conversations between a DEA agent and the cooperating co-conspirator, Thomson.[1] In his rebuttal argument, the prosecutor noted that the defendants had copies of the tapes and stated that they could have introduced the taped evidence if it had

[1] "If they really wanted to let you know what was going on, [the informant] and [the DEA agent] were both monitored at all times. Why didn't they bring these wires in here? They had a recording of what was going on. If they really wanted to tell you what was going on, why didn't they bring it here?" III Tr. 166-167.

differed from the testimony at trial.[2] Defense counsel objected; the court held a sidebar conference and then gave a curative instruction regarding a criminal defendant's right not to testify or present evidence. Pet. App. A5.

This Court has held that where a prosecutor's reference to a defendant's failure to testify is a fair response to a defense argument, the reference does not violate the privilege against compelled self-incrimination. *United States* v. *Robinson*, 485 U.S. 25, 32 (1988). Here, the prosecutor did not treat the defendants' failure to introduce the tapes as substantive evidence of guilt. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 319 (1976). Rather, as the court of appeals correctly found, the comment was a fair response to an argument made by defense counsel. Defense counsel opened the door on the issue of the tape recordings; the prosecutor simply responded to the suggestion that the government was suppressing or concealing the tape recordings. See *Darden* v. *Wainwright*, 477 U.S. 168, 182 (1986). A defense argument suggesting that particular evidence must

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[2] "[Defense counsel] says there were tapes, why didn't the Government play the tapes? * * * Yes, there were tapes in this case. I told you that at the beginning, but you had the real witnesses here. Both Defendants have the tapes. Now, they have no obligation whatsoever to present a defense. None. The burden is entirely on the Government. But, if those tapes said anything different from what you heard from the stand, you would have heard them from the Defendants. The tapes are of low quality." III Tr. 190-191. At the sidebar conference following defense objection, the prosecutor indicated that he thought he had said "defense" rather than "defendants." *Id.* at 192.

have been unfavorable to the government because the government failed to introduce it invites a response from the prosecutor that the defense had access to the evidence and could have introduced it if it were exculpatory. See, *e.g.*, *United States* v. *Rouleau*, 894 F.2d 13, 15-16 (1st Cir. 1990); cf. *United States* v. *Burnett*, 890 F.2d 1233, 1242 (D.C. Cir. 1989).

2. Petitioner claims (Pet. 10-12) that his right to a fair trial was compromised by the prosecutor's reference to the nation's drug crisis.

During closing argument, counsel for Silvestri argued that the government's case was manufactured with the connivance of Thomson, who was to receive a reduced sentence for his cooperation, and Mitchell, who was paid for assisting in the the DEA investigation.[3] In his rebuttal, the prosecutor stated that the government would not expend scarce resources prosecuting people on the basis of manufactured evidence, partly because of the magnitude of the

[3] "[Mitchell] was paid $4,100.00 for this case. And $5618.00 for all the cases. And Counsel wants you to believe that if he were not beat up by the other man that was bought, bought four years, bought between 97 months and 60 months, which is roughly over three years, if he were not beat up on January 1st by that drunk, Mr. Thomson who came in that morning, that we wouldn't be here today. I don't believe that and if you believe that, I respectfully submit, I believe, that you would be wrong in believing what the Government is trying to put in front of you." III Tr. 162. "Don't let their bought witnesses fool you. Don't let their bought witnesses get away with what they're doing." *Id.* at 171.

drug problem in this country.[4] Neither defendant objected to the statement. Pet. App. A7.

This Court has held that where a prosecutor's comments do no more than "right the scale" by substantially responding to a defense argument, the comments do not warrant reversal. *United States* v. *Young*, 470 U.S. 1, 12-13 (1985). Here, the prosecutor did not ask the jury to convict the defendants because they were part of the national drug problem. Cf. *Viereck* v. *United States*, 318 U.S. 236, 247-248 & n.3 (1943). Rather, as the court of appeals correctly found, the comment was a fair response to an argument made by defense counsel, who accused the government of buying false testimony; the prosecutor replied that a sufficient number of people traffic in drugs to make it unnecessary for the government to fabricate crimes. A defense argument suggesting that the prosecution has an improper motive invites a response from the prosecutor dispelling that suggestion. See, *e.g.*, *United States* v. *Pungitore*, 910 F.2d 1084, 1120-1127 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991).

In any event, without a timely objection, a court may take notice only of plain errors. Fed. R. Crim. P.

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[4] "Both Defense Counsel want you to believe that this is all a ruse. * * * That this was created out of whole cloth by the Government. We went out and bought this evidence just to get Thomas Silvestri and Danny Fisher. The Government has much better things to do with itself than chase Thomas Silvestri and Danny Fisher. The drug problem in this country is of a magnitude way too large for the Government to waste its time with people that have been sucked into something by two bought witnesses." III Tr. 190.

52(b). Accordingly, even if the prosecutor's statement was inappropriate, "the dispositive issue under the holdings of this Court is not whether the prosecutor's remarks amounted to error, but whether they rose to the level of 'plain error' when he responded to defense counsel." *United States* v. *Young*, 470 U.S. at 14. Plain errors are "those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 15 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). Prosecutorial comments are not likely to rise to the level of plain error. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). The court of appeals correctly concluded that the prosecutor's glancing reference to the war on drugs was not "particularly egregious," *United States* v. *Frady*, 456 U.S. 152, 163 (1982), and thus did not constitute plain error.

3. Petitioner asserts (Pet. 12-13) that the prosecutor improperly "denigrated" the efforts of his lawyer.

In his closing argument, counsel for petitioner argued that the only evidence linking petitioner to the drug conspiracy was Thomson's testimony, and he claimed that Thomson had a motive to lie because of his plea agreement with the government.[5] In his rebuttal, the prosecutor reminded the jurors that "[y]ou are the judges of credibility. What [defense

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[5] "[Thomson], in a sense, has got to perform. He's got to come across with good testimony. He's got to do all he can do and the better he does, the better he will do. He's got a motive; got a big motive. To lie. And we say that's exactly what happened." III Tr. 186.

counsel] thinks doesn't matter." III Tr. 190.[6] No objection was made to the prosecutor's comment. Pet. App. A12.

This Court has recognized that prosecutors "customar[ily]" inform the jury that arguments of counsel are not evidence. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974). The prosecutor did not disparage petitioner's lawyer personally, or question his ability or performance. Nor did the prosecutor imply that his evaluation of the evidence was entitled to more weight than defense counsel's; he merely told the jurors that they were the ones to make the credibility determination. The prosecutor's response to petitioner's counsel's assault on the evidence and the credibility of the witnesses was both appropriate and a correct statement of the law. See *United States* v. *Rivera*, 971 F.2d 876, 883 (2d Cir. 1992). The court of appeals correctly concluded that the prosecutor's comment did not constitute plain error.

4. Petitioner complains (Pet. 18-21) that the prosecutor impugned his character by eliciting testimony that a witness was afraid of petitioner and referring to that testimony during his closing argument.

Thomas Meshinski worked for petitioner and lived in the residence (owned by petitioner) where Silvestri set up a laboratory and manufactured illegal drugs. Meshinski testified that petitioner helped Silvestri move some items into the house and that foul odors

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[6] Later in his summation, the prosecutor said: "What you have to assess is Steven Thomson's credibility. Everything Mr. Thomson told you in this case was corroborated. You saw him on the stand and you were able to assess what he said. You're the judges." III Tr. 196.

came from the upstairs rooms where the laboratory was found. II Tr. 162, 169. During cross examination by defense counsel, Meshinski became visibly upset. See Gov't C.A. Br. 5. On redirect examination, the prosecutor asked him about his nervousness.[7] When Meshinski said that he was afraid of petitioner, the prosecutor asked why. Defense counsel objected and, following an off-the-record sidebar conference, the prosecutor turned to a different line of questioning. In his rebuttal argument, the prosecutor made a brief reference to Meshinski's testimony that he was afraid of petitioner.[8] No objection was made. Pet. App. A8-A9.

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[7] Q: Mr. Meshinski, are you nervous?
A: Yes.
Q: Why?
A: I don't know.
Q: Have you ever testified before?
A: No, not like this.
Q: Are you afraid of anything or anyone in connection with this case?
A: Yes.
Q: Why?
A: I am afraid of not being able to walk out of here.
Q: Why do you have that fear? Are you afraid of a person?
A: Yes.
Q: Who?
A: Danny Fisher [petitioner].
Q: Why?
[Defense objection.]

II Tr. 201.

[8] "What did Mr. Meshinski told [*sic*] you? He was afraid of someone." III Tr. 198. The court reporter noted that the prosecutor was "[i]ndicating the Defendants." *Ibid.*

After defense counsel objected to the line of questioning, the prosecutor discontinued it. As the court of appeals recognized, the record does not reflect a defense request to strike Meshinski's testimony or for a curative instruction. Pet. App. A11.[9] Under the circumstances, the court of appeals correctly determined that Meshinski's testimony did not warrant reversal:

> To the extent that Meshinski's testimony created an inference that [petitioner] was conscious of his own guilt, we note that Meshinski's testimony was cumulative of testimony that [petitioner] attempted to bribe Thomson, demonstrating a similar consciousness. In addition, permitting the jury to hear the testimony did not "strike at the fundamental fairness" of the trial. [Petitioner's] guilt was clear, and more than ample evidence implicated him in the amphetamine conspiracy.

Pet. App. A11.[10] Likewise, the prosecutor's brief mention of Meshinski's testimony in his rebuttal

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[9] This Court should disregard the self-serving affidavit of petitioner's trial counsel, Pet. App. A16, which was not part of the record below. Because petitioner failed to follow the procedures for introducing evidence of unreported proceedings on appeal, see Fed. R. App. P. 10(c), the court of appeals properly denied his motion, made after the court had decided the case, to remand the matter to the district court to supplement the record. This Court should similarly deny petitioner's request (Pet. 28) to send the case back to the district court.

[10] The court of appeals stated that petitioner's counsel failed to object to the testimony. Pet. App. A11. Counsel for petitioner's co-defendant did object, however, and the district

closing argument, to which no objection was made, did not amount to plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

AMY C. CHANG
Attorney

DECEMBER 1992

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court had prefaced the trial by stating that an objection by one lawyer would apply to both defendants. I Tr. 3. The court of appeals' determination that it was limited to a plain error analysis was nonetheless correct because counsel did not request that the testimony be stricken or ask the court to give a curative instruction. The district court granted the relief requested by terminating the line of questioning; the court did not err in sua sponte striking the testimony or giving a cautionary instruction.